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April 4, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

James Casserly, Esquire
Office of Commissioner Susan Ness
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Re: **EX PARTE**
Docket CC No. 95-185

Dear Jim:

Enclosed at your request are the materials we discussed yesterday pertaining to the Commission's jurisdiction over LEC-to-CMRS interconnection. Specifically, enclosed is a copy of a chart that explains the changing nature of the allocation of jurisdiction under Section 2, a copy of the March 22 ex parte filed by Cox Enterprises, Inc. that responds to the March 13 ex parte filed for Bell Atlantic and Pacific Telesis, and a copy of legislative history of the 1993 Budget Act pertaining to the amendments of Sections 2(b) and 332(c).

We appreciated the opportunity to meet with you. If you should have any questions on these materials, please do not hesitate to call.

Sincerely,

Laura

Laura H. Phillips

LHP/css
Enclosures

No. of Copies rec'd 0+2
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LEGISLATIVE HISTORY

HOUSE REPORT NO. 103–111

OMNIBUS BUDGET RECONCILIATION ACT OF 1993

P.L. 103–66, see page 107 Stat. 312

DATES OF CONSIDERATION AND PASSAGE

House: May 27, August 5, 1993

Senate: June 23, 24, 25, August 6, 1993

Cong. Record Vol. 139 (1993)

House Report (Budget Committee) No. 103–111, May 25, 1993
[To accompany H.R. 2264]

House Conference Report No. 103–213, Aug. 3, 1993
[To accompany H.R. 2264]

No Senate Report was submitted with this legislation. The House Report is set out below and the House Conference Report follows.

HOUSE REPORT NO. 103–111

[page iii]

CONTENTS

	Page
Statement of the Committee on the Budget	11
Title I—Committee on Agriculture:	
Letter of Transmittal	11
Report to Accompany Recommendations from the Committee on Agriculture	12
CBO Cost Estimates	61
Title II—Committee on Armed Services:	
Letter of Transmittal	71
Report to Accompany Recommendations from the Committee on Armed Services	72
CBO Cost Estimates	75
Title III—Committee on Banking, Finance and Urban Affairs:	
Letter of Transmittal	83
Report to Accompany Recommendations from the Committee on Banking, Finance and Urban Affairs	84
CBO Cost Estimates	93
Title IV—Committee on Education and Labor:	
Letter of Transmittal	105
Report to Accompany Recommendations from the Committee on Education and Labor	106
CBO Cost Estimates	135
Title V—Committee on Energy and Commerce:	
Letter of Transmittal	185
Report to Accompany Recommendations from the Committee on Energy and Commerce	186
CBO Cost Estimates	273

threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate.

Section 309(j)(8) provides that all revenues from the auction will be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code. This paragraph also clarifies that any license issued by the Commission pursuant to section 309 does not vest any property rights in the license holder and that state and local government entities shall not treat the license as the property of the licensee for tax purposes. This subsection is intended to clarify that all licenses or permits issued by the Commission are franchises that constitute Federal property and not property of the licensee. Therefore, no State or local government entity may tax or assess, directly or indirectly, the value of such license or permit held by the licensee.

Section 309(j)(9) requires the FCC to report back to Congress no later than September 30, 1997 on the auction system. In the report the Commission shall stipulate the revenues that have been raised using competitive bidding, how the competitive bidding system has met the objectives of the Act, how the designed methodology secured prompt delivery of services to rural areas, and how much more revenue is anticipated. This paragraph also stipulates that the competitive bidding authority terminates on September 30, 1998.

Section 5204

Conforming amendments. This section makes conforming amendments to subsection 309(i), which contains the authority for lotteries. This section substantially limits the ability of the FCC to use lotteries. With the enactment of this section, the FCC would only be able to use lotteries when it found that auctions were not applicable under section 309(j)(2)(A).

This section also makes technical changes to subsection (i), and requires the FCC to issue rules requiring disclosure of financial information at the time of sale of a license, and limiting the ability of lottery winners to sell their license, so as to prevent the churning and profiteering that has characterized lotteries.

Section 5205

Regulatory parity. This section amends section 332(c) to provide that services that provide equivalent mobile services are regulated in the same manner. It directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar. In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services. Uniform rules are needed to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934.

Under current law,[1] private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier

[1] 47 U.S.C. 332(d)(1) (defining "private land mobile service" to include "service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, *regardless of whether such service is provided indiscriminately to eligible users on a commercial basis*") (emphasis supplied).

status. Functionally, these "private" carriers have become indistinguishable from common carriers[2] but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes. The rates charged by common carrier licensees are subject to the requirements of title II of the Communications Act, which requires inter alia, that rates must be just and reasonable and not unreasonable discriminatory. Common carriers are also subject to state regulation of rates and services. Private carriers, by contrast, are statutorily exempt from title II of the Communications Act and from rate and entry regulation by the States.

The Committee finds that the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private. Thus, Section 5205 of the bill amends Section 332(c) of the Communications Act to require that all providers of "commercial mobile services" shall, insofar as they so engaged, be treated as common carriers for purposes of the Communications Act, except for such provision of Title II of the Act as the Commission specifies by rule shall not apply. To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services. States may petition the FCC for authority to regulate the rates for commercial mobile services under specified circumstances.

Section 332(c)(1) state that any person providing commercial mobile service, which is defined below, shall be treated as a common carrier subject to the requirements of title II. The Commission is given authority to specify by rule which provisions of title II may not apply. In specifying sections or provisions of sections that shall not apply, the Commission may not specify sections 201, 202, or 208. In addition, the Commission may not specify a provision that is necessary to ensure charges are just and reasonable and nondiscriminatory, or otherwise in the public interest.

The Commission may specify, for instance, the commercial mobile services need not be tariffed at all, or it may choose to subject such services to a policy of "permissive detariffing." The Committee is aware that the Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers, was recently found to be outside the scope of the Commission's authority under Section 203 of the Communications Act. *Amer. Tel. & Tel.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992). By permitting the Commission to "specify" which provisions of Title II of the Communications Act are not applicable to persons engaged in the provision of commercial mobile services, section 332(c)(1)(A) is intended to give the Commission the authority to reinstate this policy with respect to such persons

[2] See "In the Matter of Amendment of part 90, Subparts M and S," 3 FCC Rcd. 1826, 1840 (1988) (expanding definition of "eligible user" of specialized mobile radio service to include individuals on an indiscriminate basis, as well as Federal government entities), *aff'd* 4 FCC Rcd. 358 (1989); see also *"In the Matter of Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals,"* Notice of Proposed Rulemaking, PR Docket No. 93–35 (rel. March 12, 1993). Under the Commission's interpretation of Section 332(c)(1), the primary test for inclusion in the private and public radio services is that a licensee not resell intraconnected telephone service for a profit. *Fleet Call, Inc.*, FCC Rcd. 1533, 1537 (1991); see also *Telocator Network of America* v. *FCC*, 761 F. 2d 763 (D.C. Cir. 1985).

insofar as they are so engaged if it finds that such policy is not needed to ensure charges are just and reasonable or otherwise in the public interest.

Section 332(c)(1)(B) provides that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service, upon reasonable request. Nothing here shall be construed to expand or limit the Commission's authority under section 201, except as this paragraph provides. The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.

Section 332(c)(2) largely restates existing subsection 332(c)(2), but clarifies that parties deemed common carriers by virtue of paragraph (a)(A) of this legislation can continue to offer radio dispatch service. The intent of the Committee is not to disturb the ability of private carriers offering dispatch service prior to enactment from continuing to offer such service. In addition, this section authorizes the FCC to decide as part of its rulemaking pursuant to section 332(c) whether all common carriers should be able to provide dispatch service.

Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating the other terms and conditions of commercial mobile services. It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

Section 332(c)(3)(b) permits states to petition the Commission for authority to regulate rates for any commercial mobile services where mobile services have become a substitute for telephone service, or where market conditions are such that consumers are not protected from unreasonable and unjust rates. In assessing, under clause (ii), whether market conditions are such that consumers are not protected from unreasonable and unjust rates. In assessing, under clause (ii), whether market conditions in a state fail to protect subscribers of commercial mobile services adequately, the FCC shall take into account such factors as the number of such subscribers in proportion to the total population of a service area; and the number of market entrants providing such services. In reviewing petitions under clause (ii), the Commission also should be mindful of the Committee's desire to give the policies embodies in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Com-

mittee. The FCC is required to respond to any states petition within 9 months of filing.

Section 332(c)(4) provides that nothing here affects the regulation of Comsat pursuant to title IV of the Communications Satellite Act of 1962.

Section 332(c)(5) defines the terms used in this subsection. "Commercial mobile service" is defined as a mobile service, as defined in section 3(n), that is interconnected with the public switched telephone network offered for profit and held out to the public, or offered on an indiscriminate basis to classes of eligible users, or to such a broad class so as to equal the public. "Private land mobile service" is defined as anything that does not fall under commercial mobile service. The legislation also directs the Commission to define "interconnected" and "public switched telephone network". In defining "interconnected" the Commission should consider how that term is used and qualified in current section 332(c)(1). The effect of this definition is to maintain a large number of SMRs which provide service to a narrow group of customers under the Private Land Mobile category.

Section 5206(b) makes conforming changes to the definition of "mobile service" in section 3(n) by incorporating the definition of "private land mobile service," found in section 3 (gg), and adding to it a definition of licensed personal communications services that the Commission would establish as part of its proceedings.

This section requires the FCC to review its rules affecting private land mobile services and within 1 year issue such changes as may be necessary to achieve regulatory parity for those persons providing equivalent services. It is the intent of the Committee that the Commission make a complete assessment of its rules affecting private land mobile, including loading requirements, spacing limitations, and others to determine whether such rules still serve the public interest in light of the changes made by this legislation. Current commission policy prohibits common carriers from being licensed to offer Specialized Mobile Radio service. The Committee encourages the Commission to re-examine this restriction in light of the enactment of this section to determine the extent to which such a restriction is in the public interest.

This paragraph also provides that the Commission has authority to build in effective dates for its rules that allow for an orderly transition. However, nothing in the Commission's rules could have the effect of accelerating the three-year period for compliance stipulated in section 5208(c)(2). Paragraph (1) provides that the effective date for the changes made on common carriers shall take effect within 1 year. It further provides, however, that those persons who are now regulated as private land mobile service providers and whose status would change to common carrier by virtue of this Act have 3 years to comply.

Section 5206

Effective dates and deadlines. This section directs the FCC to issue rules on a system of competitive bidding within 20 days. It also directs the FCC to issue its report and order on PCS within 180 days, and to commence issuing licenses for PCS within 270 days. Finally, subsection (c) provides that the FCC shall not use

Senate amendment

The Senate Amendment makes almost the identical changes to the definition of "mobile service" in Section 3(n) of the Communications Act except that the Senate Amendment clarifies that the term does not include rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire.

Conference agreement

The Conference Agreement adopts the House definition.

SUBSECTION (b)(2)

House bill

Section (b)(2) of the House bill makes additional conforming amendments to clarify headings and spacing.

Senate amendment

The Senate Amendment does not contain the provisions contained in the House bill. The Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act to clarify that the Commission has the authority to regulate commercial mobile services.

Conference agreement

The Conference Agreement adopts the Senate position.

SUBSECTION (c)

House bill

Section 5206 of the House bill established effective dates and deadlines for Commission action. Under the House bill, the amendments made by the above chapter are effective upon the date of enactment, except that the amendments made by section 5205 on regulatory parity take effect one year after enactment, and that persons that provide private land mobile services shall continue to be treated as a provider of private land mobile service until 3 years after enactment. The House bill directs the FCC to prescribe rules to implement competitive bidding within 210 days of enactment. The House bill directs the Commission to, within 180 days after enactment, issue a final report and order in two proceedings regarding personal communications services and begin issuing licenses within 270 days after enactment. Finally, the House bill directs the Commission, within 1 year after enactment, to alter its rules regarding private land mobile services to provide for an orderly transition of these services to regulation as common carrier services.

Senate amendment

Under the Senate Amendment, all provisions regarding regulatory parity take effect one year after enactment, except: (1) the provisions in 332(c)(1)(A) regarding the treatment of commercial mobile services as common carrier services take effect upon enactment; and (2) any person that provides private land mobile services before such date of enactment shall continue to be treated as a pro-

Senate amendment

No provision.

Conference agreement

The Conference Agreement includes the provisions of the House Bill.

SECTION 332(C)(1)

House bill

Section 332(c)(1)(A) states that any person providing commercial mobile service shall be treated as a common carrier subject to the requirements of title II of the Communications Act. The Commission is given authority to specify by rule which provisions of title II may not apply. In specifying sections or provisions of sections that shall not apply, the Commission may not specify sections 201, 202, or 206. In addition, the Commission may not specify a provision that is necessary to ensure charges are just and reasonable and not unjustly or unreasonably discriminatory, or otherwise in the public interest.

The House bill requires in section 332(c)(1)(B) that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service, upon reasonable request. Nothing here shall be construed to expand or limit the Commission's authority under section 201, except as this paragraph provides.

Senate amendment

Section 332(c)(1)(A) of the Senate Amendment is the same as the House provision except:

the Senate amendment states expressly that the Commission may waive the requirements of sections 203, 204, 205, and 214, and the 30-day notice requirement of section 309(a):

the Senate amendment specifies that the Commission may not waive sections 201, 202, 206, 208, 209, 215(c), 216, 217, 220(d) or (e), 223, 225, 226(a), (b), (c), (d), (e), (f), (g), or (i), 227 or 228.

Section 332(c)(1)(B) of the Senate provision is identical to the House provision.

Section 332(c)(7) as added by the Senate bill states that the Commission, in any proceeding under this subsection, (i) shall consider the ability of new entrants to compete in the services to which such proceeding relates, and (ii) shall have the flexibility to amend, modify, or forbear from any regulation of new entrants under this subsection, or consistent with the public interest, take other appropriate action, to provide a full opportunity for new entrants to compete in such services.

Conference agreement

With regard to section 332(c)(1)(A), the Conference Agreement adopts the House approach with some modifications. The intent of this provision, as modified, is to establish a Federal regulatory framework to govern the offering of all commercial mobile services. The Conference Agreement adds two additional requirements that

the Commission must meet before specifying any provision as inapplicable. In addition to requiring that the Commission determine that enforcement of the provision is not necessary in order to ensure that charges are reasonable, the Conference Agreement requires the FCC to determine that enforcement of the provision is not necessary for the protection of consumers and that specifying such provision is consistent with the public interest. The Conference Agreement adopts the House provision of section 332(C)(1)(B). Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.

By dropping the list of provisions in the Senate Amendment that the Commission may not specify by rule, the Conferees do not intend to diminish the importance of these provisions to consumers. The Conferees intend to give the Commission the flexibility to determine whether or not the enforcement of these provisions is necessary, in light of their significance to consumers.

The fact that all commercial mobile services will be treated as common carriers under this provision is not intended to affect the telephone-cable cross-ownership provision contained in Section 613(b) of the Communications Act.

Section 332(c)(1)(C) of the Conference Agreement directs the Commission to review and analyze competitive market conditions with respect to commercial mobile services in its annual report. This section also states that the Commission, as part of determining whether a provision is consistent with the public interest under subparagraph (A)(iii), shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions. If the Commission determines that such regulation will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation is in the public interest.

The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier. For instance, the Commission may, under the authority of this provision, forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition or to protect consumers against unjust or unreasonable rates or unjustly or unreasonably discriminatory rates. At the same time, the Commission may determine that it should not specify some provisions as inapplicable to some commercial mobile services providers, or may choose to "unspecify" certain provisions for certain providers, if it determines, after analyzing the market conditions for commercial mobile services, that application of such provisions would promote competition and protect consumers.

Section 332(c)(1)(D) of the Conference Agreement provides that the Commission shall conduct a rulemaking to implement this paragraph with respect to the licensing of personal communications services within 180 days after the enactment of this Act. This pro-

vision is necessary because the Act elsewhere requires the Commission, in order to speed the licensing of personal communications services, to complete two other proceedings concerning the rules for personal communications services within 180 days. Completion of a rulemaking regarding the regulatory treatment of personal communications services prior to the issuance of licenses through competitive bidding for these services will provide regulatory certainty that will enhance the value of the licenses.

SECTION 332(C)(2)

House bill

Section 332(c)(2) as added by the House bill clarifies that a party engaged in private land mobile service shall not be treated as a common carrier. This section also clarifies that parties deemed common carriers by virtue of paragraph (1)(A) can continue to offer radio dispatch service. In addition, this section authorizes the FCC to decide whether all common carriers should be able to provide dispatch service in the future.

Senate amendment

The provision of the Senate bill is almost identical to the House provision.

Conference agreement

The Conference Agreement adopts the House language.

SECTION 332(C)(3)

House bill

Section 332(c)(3)(A) added by the House bill provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing shall preclude a state from regulating the other terms and conditions of commercial mobile services. Section 332(c)(3)(B) permits states to petition the Commission for authority to regulate rates for any commercial mobile services where mobile services have become a substitute for telephone service, or where market conditions are such that consumers are not protected from unreasonable and unjust rates. The FCC is required to respond to any state's petition within 9 months of filing.

Senate amendment

Section 332(c)(3)(A) of the Senate Amendment is identical to the House provision except that it explicitly recognizes that nothing in this subparagraph exempts providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the continued availability of telephone exchange service at affordable rates.

Similarly, section 332(c)(3)(B) as added by the Senate Amendment permits the State to petition for the right to regulate, but

under slightly different standards. Under the Senate Amendment, a state may obtain regulatory authority if the state demonstrates that the commercial mobile service is a substitute for land line telephone exchange service for a substantial portion of the communications within such State (rather than substantial portion of the public).

Section 332(c)(3)(C) of the Senate Amendment is a "grandfathering" provision that permits states that regulate the rates for any commercial mobile services as of June 1, 1993 to continue to exercise such authority until the Commission issues a final order in response to a petition filed by the State requesting that the State be authorized to continue exercising authority over such rates. The Commission must rule on such a petition within nine months and must grant the petition if the State satisfies the showing required under subparagraph (B)(i) or (B)(ii). Section 332(c)(3)(D) of the Senate Amendment permits any interested party to petition the Commission, after a reasonable period of time after the issuance of an order under subparagraph (B) or (C), for an order that the State authority to regulated rates is no longer necessary. After receiving public comment on the petition, the Commission must rule on such petition within 9 months.

Conference agreement

The Conference Agreement retains the Senate language concerning universal service, with slight modifications to clarify that universal service can be provided by any provider of telecommunications service. The Conference Agreement adopts the language "substantial portion of the telephone land line exchange service" rather than either "communications" or "public" to more accurately describe the situation in which state authority to regulate commercial mobile services should be granted. For instance, the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.

The Conference Agreement merges subparagraphs (C) and (D) of the Senate Amendment into subparagraph (B) to provide regulatory certainty to potential bidders for licenses to provide commercial mobile services. The Conference Agreement clarifies that State authority to regulate is "grandfathered" only to the extent that it regulates commercial mobile services "offered in such State on such date". The Conference Agreement also clarifies that the State authority continues in effect until the Commission completes all action on the petition (including reconsideration). The Commission must complete all action on any state petition (including action on petitions for reconsideration) within 12 months after the petition is filed. The Conference Agreement further clarifies that State authority to regulate is only "grandfathered" if the State files a petition seeking such authority within 1 year after the date of enact-

ment; if the State fails to file a petition within this time, the State authority is preempted as all other States are preempted under subsection (c)(3)(A).

It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.

SECTION 332(C)(4)

House bill

Section 332(c)(4) of the House Bill states that nothing in this provision affects the regulation of Comsat pursuant to title IV of the Communications Satellite Act of 1962.

Senate amendment

The Senate provision is identical to the House provision.

Conference agreement

The Conference Agreement accepts the House provision.

SECTION 332(C)(5)

House bill

No provision.

Senate amendment

Section 332(c)(5) as added by the Senate Amendment provides that the Commission shall continue to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

Conference agreement

The Conference Agreement adopts the Senate provision with slight modification to clarify that the Commission may continue to use its existing procedures to determine whether the provision of space segment capacity to providers of commercial mobile services shall be treated as common carriage. Under section 332(c)(1)(A), however, the provision of space segment capacity directly to users of commercial mobile services shall be treated as common carriage.

SECTION 332(C)(6)

House bill

No provision.

Senate amendment

Section 332(c)(6) as added by the Senate Amendment states that the foreign ownership restrictions of Section 310(b) shall not apply to any lawful foreign ownership in a provider of commercial mobile services prior to May 24, 1993, if that provider was not regulated as a common carrier prior to the date of enactment of this Act and is deemed a common carrier as a result of this Act.

Conference agreement

The Conference Agreement adopts a modified version of the Senate provision. The purpose of this provision is to "grandfather" any foreign ownership in a provider of private land mobile services that existed prior to May 24, 1993 if that provider becomes a common carrier under this Act. Section 310(b) of the Communications Act limits the amount of private foreign ownership in a common carrier service but does not impose any such limits on the foreign ownership in private radio service. Currently, some foreign-owned companies provide private radio services. Some of these companies will become common carriers as a result of section 332(c)(1)(A). Without this "grandfathering" provision, these companies would be forced to divest themselves of any foreign ownership when this Act becomes effective.

In order to avoid this result, the Conference Agreement accepts the Senate provision with modifications to limit its application. First, Section 332(c)(6) as added by the Conference Report requires a person that may be affected by this provision to file a waiver request with the Commission within 6 months of enactment. The FCC may grant the waiver only on the following conditions:

(1) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(2) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b). In effect, this condition "grandfathers" only the particular person who holds the foreign ownership on May 24, 1993; the "grandfathering" does not transfer to any future foreign owners.

Section 310(b) addresses the permissible extent of foreign investment in certain radio licenses, including common carriers. One effect of the denomination of commercial mobile services as common carrier services is to broaden the range of services subject to limitations on foreign investment. In securing regulatory parity for commercial mobile services, the Conference Agreement does not restrict the FCC's discretion, pursuant to section 310(b)(4), to permit foreign investors to acquire interests in U.S.-licensed enterprises. These amendments in no way affect the Commission's authority under section 310(b).

SECTION 322(d)

House bill

Section 322(d) of the House bill defines the terms "commercial mobile service" and "private mobile service". "Commercial mobile service" is defined as a mobile service, as defined in section 3(n), that is interconnected with the Public switched telephone network offered for profit and held out to the public, or offered on an indiscriminate basis to classes of eligible users, or to such a broad class so as to equal the public. "Private mobile service" is defined as anything that does not fall under commercial mobile service. The provisions also direct the Commission to define "interconnected" and "public switched telephone network".

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March 22, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Ex Parte* Communication in CC Docket No. 95-185

Dear Mr. Caton:

Cox Enterprises, Inc. ("Cox"), by its attorneys, submits this *ex parte* letter for incorporation into the above-referenced proceeding.[1/] This letter responds to an *ex parte* letter jointly filed by Bell Atlantic Corporation and Pacific Telesis Group on March 13, 1996 in CC Docket No. 95-185.[2/] It also supplements the analysis of the Commission's jurisdiction provided in Cox's comments in this proceeding.

The BOC *Ex Parte* characterizes Cox's analysis of the Commission's jurisdiction over CMRS interconnection as "an elaborate statutory maze" that the Commission should not attempt to navigate. In fact, the process of determining the Commission's jurisdiction is much more like connecting the dots. There is a straightforward path that results in a clear picture and demonstrates that the Commission has the authority to regulate all CMRS interconnection. There also are several alternative paths by which the Commission can reach the same result.

1/ In accordance with Section 1.1206 of the Commission's Rules, the original and two copies of this letter are being filed with the Secretary's office.

2/ *See* Letter from Michael K. Kellogg, Counsel for Bell Atlantic Corp. and Pacific Telesis Group to William F. Caton, Acting Secretary, Federal Communications Commission, file in CC Docket No. 95-185, on March 13, 1996 (the "BOC *Ex Parte*").

THE COMMISSION'S EXISTING JURISDICTION UNDER SECTIONS 2(B) AND 332

The BOC *Ex Parte* relies in large part on Bell Atlantic's and Pacific's view of Sections 251 and 252 of the Telecommunications Act of 1996 (the "TCA"), but that is not where the Commission should start its analysis. Instead, the Commission must begin with Sections 2(a) and 2(b) of the Communications Act. Section 2(a) grants the Commission broad authority to regulate communications across the nation. Section 2(b) limits this broad authority to some extent by "fencing off" "intrastate" matters from Commission jurisdiction and reserving them to state authorities.[3/] Nothing in the TCA disturbs this jurisdictional scheme.[4/]

Section 2(b) is a simple provision, but it is extraordinarily important. Without Section 2(b), there would be no bar to complete Commission displacement of state authority. *See Houston, E. & W. T. R.. Co. v. United States*, 234 U.S. 342 (1913) (construing predecessor provision of Section 2(a) in the Interstate Commerce Commission's authorizing legislation). Thus, it is highly significant that, in the 1993 Budget Act, Congress expressly amended Section 2(b) to move the "fence" and bring CMRS under the Commission's sole jurisdiction. In relevant part, Section 2(b) now reads as follows:

> *Except as provided in . . . Section 332 . . .* nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier[.]

47 U.S.C. § 152(b) (emphasis added). In other words, the limitations that otherwise would restrict the Commission's jurisdiction over "intrastate" CMRS no longer apply, because Section 2(b) says they do not. While the BOC *Ex Parte* devotes considerable attention to various side issues (discussed below), it does not address the impact of amended Section 2(b), presumably because the BOCs' entire theory would fall apart if it did.

The amendment to Section 2(b), in turn, leads directly to Section 332. Through Section 332, the Budget Act vests the Commission with exclusive jurisdiction over all aspects of CMRS interconnection, including LEC-to-CMRS interconnection. As Cox has demonstrated in previous filings, the Budget Act specifically assigned jurisdiction over interconnection to the Commission

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3/ *See* 47 U.S.C. § 152(b); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

4/ *See* discussion *infra* at pp. 4-7.

through Section 332(c)(1).[5/] Section 332(c)(1)(A) makes clear that CMRS providers are to be treated as common carriers for the purposes of Section 201.[6/] Section 332(c)(1)(B) gives the Commission authority over LEC-to-CMRS interconnection. 47 U.S.C. § 332(c)(1)(B) (upon request of a CMRS provider, "the Commission shall order a common carrier to establish physical connections with such service provider pursuant to the provisions of Section 201 of this Act").

The final line to be connected, therefore, is from Section 332 to Section 201. Section 332(c)(1) requires interconnection in accordance with the requirements of Section 201. 47 U.S.C. § 332(c)(1)(A), (B). The Commission's Section 201 authority empowers it to set the rates, terms and conditions of interconnection for carriers subject to the Commission's jurisdiction. 47 U.S.C. § 201. By including CMRS providers in the category of carriers that fall within the Commission's jurisdiction, Sections 332(c)(1) and 201 in concert give the Commission the power to set the rates, terms and conditions of CMRS interconnection.[7/] Notably, this authority applies regardless of whether the CMRS traffic at issue is conceptually inter- or intrastate. Indeed, because Section 201 already gave the Commission power over interstate interconnection between LECs and CMRS providers, the only reason for Congress to include Section 332 (c)(1)(B) would be to extend the Commission's power to encompass as well all other LEC-to-CMRS interconnection.

This analysis is quite straightforward and simple, not at all convoluted as Bell Atlantic and Pacific claim. Moreover, the Commission is required to interpret the statute as a whole. It is unfortunate that Bell Atlantic and Pacific have such disdain for statutory interrelationships

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5/ *See* Cox February 28 *Ex Parte*; *Ex Parte* Letter from Werner K. Hartenberger, Counsel for Cox Enterprises, Inc. to William F. Caton, Secretary, Federal Communications Commission, filed on October 16, 1995, in CC Docket No. 94-54 ("Cox October 16 *Ex Parte*").

6/ 47 U.S.C. § 332(c)(1)(A) (a CMRS provider shall "be treated as a common carrier," including for the purposes of Section 201). Section 332(c)(3)(A) emphasizes this point by providing that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service[.]" 47 U.S.C. § 332(c)(3)(A). As discussed below on pages 9-10, this language encompasses state regulation of CMRS interconnection rates and also, given the mutual nature of interconnection arrangements, necessarily governs both sides of the LEC-CMRS interconnection transaction.

7/ Rather than providing its own analysis of Sections 2(b) and 332, the BOC *Ex Parte* claims that adopting Cox's analysis would require the Commission to overrule existing precedent. As described on pages 10-12, that claim is incorrect.

(which they refer to as "mazes"), given that reading the entire text of a law, rather than merely a few snippets, is a primary requirement of faithful and complete statutory construction.[8/]

THE EFFECTS OF THE TELECOMMUNICATIONS ACT OF 1996

The true focus of the BOC *Ex Parte* is the impact of new Section 251 on the Commission's pre-existing interconnection authority. Section 251 of the TCA generally imposes mandatory interconnection duties upon local exchange carriers and incumbent local exchange carriers. 47 U.S.C. § 251. Section 252, in addition to allowing LECs and other telecommunications carriers to enter into voluntarily negotiated interconnection agreements, creates a state arbitration and agreement approval process. 47 U.S.C. § 252. The BOC *Ex Parte* claims that the specific requirements of Sections 251 and 252 now govern "all local interconnection agreements," including all interconnection previously within the Commission's jurisdiction.[9/] In other words, Bell Atlantic and Pacific claim that the Section 251 regime displaces the Commission's existing authority and diminishes the Commission's power over interconnection — including interconnection relating exclusively to interstate traffic — previously within its jurisdiction. That is not what the statute says and is not what Congress intended. The BOC *Ex Parte* identifies no specific provision that would accomplish this feat. In fact, Sections 251 and 252 expand the Commission's jurisdiction without diminishing its existing powers.

Section 251(i) directly contradicts the BOC *Ex Parte* and shows that Section 251 adds to, rather than subtracts from, the Commission's authority. It states that: "Nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." 47 U.S.C. § 251(i). In other words, the Commission's existing jurisdiction remains intact and any further power granted by the TCA is *in addition* to the jurisdiction over interconnection

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8/ *See, e.g., Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (the Supreme Court looks to "design of statute as a whole"); *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (statutes should be interpreted so as not to render one part inoperative); *see also* 2A Sutherland Stat. Const. § 46.05 (statutes are "passed as a whole and not in parts or sections") and § 46.06 ("A statute should be construed so that effect is given to all its provisions").

9/ BOC *Ex Parte* at 6-7. The BOCs' expansive view of the reach of Sections 251 and 252 does not extend to access charges. *Id.* at 7 n.9 (stating that interconnection for access purposes is not subject to Section 251). While Cox does not express a view here on the merits of this argument, there is no principled basis for the BOCs to argue that Section 251 maintains the Commission's existing jurisdiction over certain services but divests it of jurisdiction over other services.

issues already given to the Commission prior to enactment of the TCA.[10/] Thus, pursuant to Section 251(i), the Commission's existing authority over interconnection, provided through Section 201, remains in place. Because Section 332(c)(1) applies the Commission's Section 201 powers to CMRS and also remains in full force and effect, the Commission retains its authority over CMRS interconnection as well.

The BOC *Ex Parte* responds to the plain language of Section 251(i) by claiming that Sections 251 and 252 govern "all local interconnection arrangements," intrastate or interstate. BOC *Ex Parte* at 6-7. If that were true, then the Section 201 savings clause in Section 251(i) would have no meaning in the context of the TCA because it would have no effect. Such an interpretation is heavily disfavored under traditional canons of statutory construction.[11/] That interpretation also is contradicted by the TCA Conference Report, ignored by the BOC *Ex Parte*, which states unequivocally that:

> New subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are *in addition to, and in no way limit or affect, the Commission's existing authority* regarding interconnection under section 201 of the Communications Act.[12/]

Despite the BOC *Ex Parte*'s colorful characterizations of Section 251(i) as a "back door" and a "trojan horse",[13/] in point of fact Section 251(i) is an explicit savings clause that the Commission and the courts must obey.[14/] Moreover, this view is fully consistent with the broad

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10/ The BOC *Ex Parte* appears to argue that this language somehow also means that Section 251 does not expand the Commission's powers. That view is inconsistent with the language of Section 251(i) and, as shown below, with the legislative history of the TCA.

11/ As one of the principal authorities on statutory construction explains, "A statute should be construed so that effect is given to all its provisions." 2A Sutherland Stat. Const. § 46.06. *See also* sources cited *supra* note 8.

12/ *See* Joint Explanatory Statement of the Committee of Conference *reprinted in* 142 Cong. Rec. H1107, H1110 (daily ed. January 31, 1996) ("TCA Conference Report") (emphasis added).

13/ *See* BOC *Ex Parte* at 6-7.

14/ *See Louisiana PSC*, 476 U.S. at 373, 376-7 n.5 (the Supreme Court describes the "savings clause" of Section 2(b) as a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how (continued...)

thrust of the TCA, which extends rather than restricts the Commission's powers over issues formerly reserved to the states, including interconnection.

The BOC *Ex Parte* does not stop by claiming that Section 251(i) fails to preserve the Commission's pre-existing jurisdiction. It goes even further afield from the plain meaning of the TCA by arguing that, even if the Commission's pre-existing jurisdiction were preserved, the Commission still would be bound to apply the standards of Sections 251 and 252 to the services that remained in its jurisdiction. BOC *Ex Parte* at 7-8. This hypothesis makes no sense and begs the question of why Section 251(i) was adopted in the first place. More important, if Congress had meant for the Commission's Section 201 powers to be bounded by the requirements of Section 251, it would have said so. Instead, Congress did exactly the opposite by specifically preserving the Commission's existing powers, which include setting rates for services subject to Section 201.[15/]

Finally, to adopt the interpretation of the TCA advanced in the BOC *Ex Parte*, the Commission would have to hold that the TCA implicitly repealed all or parts of Sections 2(a), 2(b), 201 and 332 of the Communications Act. There is no evidence that Congress intended such a result, either from the text of the TCA or the legislative history. In fact, as shown above, Congress adopted Section 251(i) to avoid conflicts with the Commission's existing authority. Basic principles of statutory construction heavily disfavor interpretations that require implicit repeals of existing statutes.[16/] In light of the explicit Congressional direction to the

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14/ (...continued)
we should read [the substantive framework of Title II])."

15/ The BOC *Ex Parte* takes one last shot at the effect of Section 251(i) by suggesting that, as a "general" provision, it is trumped by the "specific" provisions of the rest of Section 251. As the case cited by Bell Atlantic and Pacific demonstrates, that proposition of statutory construction applies only when there is a conflict between two provisions. *Ohio Power Co. v. FERC*, 954 F.2d 779, 784-85 (D.C. Cir. 1992) ("when a conflict arises between specific and general provisions of the same legislation" the specific provision should be applied). Here, Section 251(i) does not create a conflict but instead resolves one by specifically retaining the Commission's existing authority over those matters that already were within its jurisdiction and excepting those matters from the rest of Section 251.

16/ *See St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 772, 787-88 (1981) (where "legislative history does not reveal any clear intent to repeal" or "alter [the] meaning" of a provision, there is no repeal by implication) *citing Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-56 (1976) (where "it is possible (continued...)

contrary, the Commission cannot adopt an interpretation of Section 251 that, by implicit repeal, shrinks its jurisdiction over interconnection.

In sum, there is no support for the interpretation proposed by the BOC *Ex Parte*. In light of the actual language of Section 251(i), the continued vitality of Sections 2(a), 2(b), 201 and 332, and the express direction of Congress in the TCA Conference Report that the provisions of Section 251 "are in addition to and in no way limit or affect, the Commission's existing authority" under Section 201, it is obvious that the interpretation of 251(i) put forth in the BOC *Ex Parte* is nonsensical.

THE COMMISSION'S JURISDICTION UNDER *LOUISIANA PSC*

As the discussion above shows, the Commission has jurisdiction over CMRS interconnection through Sections 201 and 332. Because Section 332 has been exempted from the "jurisdictional fence" of Section 2(b)(1), there is no need to review the Commission's jurisdiction under *Louisiana PSC*. It is quite clear that what Congress did in amending Section 2(b) was to exempt CMRS from the requirements of that provision, so the *Louisiana PSC* standards do not apply.[17] If, however, the Commission did engage in a review under the *Louisiana PSC* standards, its analysis still would support a conclusion that the Commission has jurisdiction over all CMRS interconnection rates.

As a threshold matter, the Commission should recognize that its ability to preempt state intrastate interconnection determinations has been enhanced by new Section 251(d)(3) of the

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16/ (...continued)
for the statutes to coexist," even if it is inconvenient for them to do so, "they are not so repugnant to each other as to justify a finding of an implied repeal by this Court").

17/ When, as here, Congress has adopted statutory language that grants the Commission authority over what otherwise would be intrastate services, *Louisiana PSC* is inapposite. The fatal flaw in the Commission's jurisdictional argument in *Louisiana PSC* was that Congress had not granted the Commission jurisdiction over depreciation matters in Section 2(b). If Section 2(b) had been amended to exempt depreciation rates, then *Louisiana PSC* would have been decided differently. *Louisiana PSC*, 476 U.S. at 377 n.5 (the Supreme Court states that "the Act itself, in § []2(b), presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [the depreciation provisions of] §220."). Here, Congress has granted the Commission jurisdiction over CMRS through the Budget Act amendments. In short, *Louisiana PSC* is irrelevant in circumstances, such as CMRS interconnection, in which Section 2(b) has expressly granted the Commission jurisdiction.

Communications Act. Section 251(d)(3) adopts a more liberal test than the requirements of *Louisiana PSC*.[18/] Under Section 251(d)(3), the Commission may preempt a state regulation or decision that *either* is inconsistent with the requirements of Section 251 *or* substantially prevents the implementation of Section 251 or the purposes of the competitive markets provisions of the 1996 Act. Thus, to the extent that the Commission determines that a state's intrastate interconnection policy or rate is contrary to the federal policy of encouraging competition with incumbent landline carriers, it has the power to preempt the state.[19/]

There are many ways in which state actions could frustrate the Congressional intent to assure the swift emergence of wireless competition. For example, requiring individual state negotiations for wireless interconnection would seriously delay the deployment of nationwide wireless networks such as Sprint Spectrum. At the same time, and as discussed below, because the Commission indisputably has jurisdiction over the CMRS-to-LEC half of the interconnection equation, letting states regulate the other half of the equation would likely undermine the Commission's implementation of the pro-competitive policies embodied in the TCA and the 1993 Budget Act. Indeed, states already have shown they will use interconnection policies to rein in potential competition from CMRS providers.[20/] Accordingly, even if Section 251(d)(3) were the only source of Commission authority to assert its jurisdiction and preempt state wireless interconnection policies, these facts would be sufficient to justify such action.[21/]

Moreover, even assuming the Commission's preemptive powers had *not* been strengthened by Section 251(d)(3) of the TCA, the Commission also would have had the power

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18/ Under *Louisiana PSC*, the Commission may preempt state regulation when the state regulation frustrates a valid federal purpose and it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation." *Louisiana PSC*, 476 U.S. at 734 n.4.

19/ Inexplicably, the BOC *Ex Parte* treats Section 251(d)(3) as a limitation on the Commission's authority. BOC *Ex Parte* at 3. In fact, this provision grants the Commission broader authority to preempt state actions that are inconsistent with either the specific "requirements" of Section 251 or the expansive "purposes" of Part B of Title II to encourage competition. 47 U.S.C. § 251(d)(3)(C). This power is much broader than the preemption permitted the Commission under current interpretations of *Louisiana PSC*.

20/ For instance, a state could allow a LEC to charge a CMRS provider highly inflated CMRS interconnection rates that would preclude CMRS competition in the local residential telephone service market. *See infra* note 24.

21/ The ability of the states to vitiate the important federal policy favoring competition adopted by the Budget Act and the TCA also satisfies the "frustration" prong of the *Louisiana PSC* test.

to preempt state regulation of CMRS interconnection under prior law. While Congressional action in adopting both the 1993 Budget Act and the 1996 Act renders this exercise unnecessary, the precedent governing the extent of the Commission's authority under Section 2(b) gives the Commission the power to exert jurisdiction over LEC-to-CMRS interconnection. Under *Louisiana PSC* and the *North Carolina Utility Commission* cases, the Commission could preempt state regulation of intrastate services if it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation." *Louisiana PSC*, 476 U.S. at 375 n.4. Inseverability has been recognized most notably in the context of interconnection of customer premises equipment with the public switched network, where the federal policy of detariffing trumped state tariffing requirements.

It is unarguable that the Commission has jurisdiction over all interstate interconnection and, by virtue of Sections 332(c)(1)(A) and 332(c)(3)(A), over the rates charged by CMRS providers for all interconnection.[22/] Ignoring for the moment the effect of Section 332(c)(1)(B) and its grant of sole authority over CMRS interconnection to the Commission, it may be suggested that intrastate interconnection from local exchange carriers to CMRS providers has been left within the states' jurisdiction. In practice, however, it is impossible to separate CMRS-to-LEC interconnection from LEC-to-CMRS interconnection, because it is all one transaction. Indeed, some LECs, including Pacific, actually claim that the rates they now charge for interconnection already are net rates, *i.e.*, they encompass both the LEC's charge to the CMRS provider and the CMRS provider's charge to the LEC.[23/] Thus, because interconnection negotiations encompass both sides of the same equation, the Commission's failure to claim its jurisdiction over LEC-to-CMRS interconnection effectively would abdicate jurisdiction over CMRS-to-LEC interconnection as well.

Moreover, the Commission simply cannot parse CMRS interconnection into "federal" and "state" segments with separate spheres of responsibility. As noted above, even under the most restrictive theory of its authority, the Commission plainly has jurisdiction over most elements of the interconnection equation. It cannot cede that jurisdiction to the states. If, however, the

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22/ *See* discussion *supra* at pp. 2-3 & note 6. LEC comments also recognize that the rates LECs charge CMRS providers for interconnection are reflected in the rates charged to CMRS end user customers.

23/ *See* Comments of Pacific at 79 (bilateral interconnection negotiations lead to charge from LEC for interconnection and no charge from CMRS provider); *see also* Comments of United States Telephone Association at 5 ("Rather, LECs and CMRS providers may negotiate mutually acceptable terms whereby the LEC compensates the CMRS provider for terminating LEC-originated traffic through a reduction in the rate it otherwise would charge the CMRS provider for terminating CMRS-originated traffic.").

power devolves to the states to determine the "LEC" portion of interconnection rates, experience shows that LECs will manipulate the process to maintain excessive interconnection charges that prevent CMRS providers from competing in the local telephony marketplace.[24/] Because the Commission has the authority to prevent this anticompetitive outcome, which seriously undermines the strong federal interest in promoting local exchange competition, it should not permit this practice to persist.[25/]

CMRS interconnection also is physically inseverable. CMRS market boundaries — MSAs, MTAs, BTAs and regional cellular and ESMR coverage areas — have been drawn without regard for state boundaries, and the radio signals used to carry CMRS traffic do not respect state lines. Moreover, it is difficult if not impossible for LEC and CMRS networks to determine not only whether a particular CMRS call should be classified as interstate or intrastate in nature but also what proportion of calls would be deemed interstate or intrastate. These physical characteristics of CMRS, coupled with an interest in promoting the rapid deployment of wireless networks nationwide, prompted Congress to adopt the Budget Act amendments to Section 332. As the House Report on the Budget Act explains, the jurisdictional provisions of Section 332 are intended "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[26/] This statement succinctly describes why Congress chose to vest the Commission with sole authority over CMRS interconnection issues.

THE EFFECTS OF PRIOR COMMISSION DECISIONS

The BOC *Ex Parte* also argues that Section 332 did not federalize CMRS interconnection because various Commission decisions would have to be overruled. Indeed, this is the sum of the BOCs' argument against Cox's analysis of Sections 2(b) and 332; the BOC *Ex Parte* does not even argue that these cases were decided correctly. Review of those decisions shows, however, that they have no effect on the Commission's power to determine that it has jurisdiction over the rates, terms and conditions of CMRS interconnection.

24/ Experience in several states also suggests that, without FCC intervention, state commissions may act to deny CMRS providers the benefit of more reasonable interconnection arrangements available to landline facilities-based competitors. *See* Comments of Comcast at n.102.

25/ This federal interest has been highlighted by the passage of the TCA.

26/ H.R. Rep. No. 103-111, at 260. In this connection, it is noteworthy that Section 332 maintains Commission jurisdiction even in cases where Section 221(b) would give a state jurisdiction over "local interstate" traffic. *See* 47 U.S.C. § 332(c)(3).

First, the BOC *Ex Parte* contends that the Commission's statement in the *CMRS Second Report and Order* that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates" would have to be overruled. 9 FCC Rcd 1411, 1480 (1994). That issue, of course, is the subject of pending reconsiderations of the *CMRS Second Report and Order*.[27] Thus, it is not a final order and has no precedential effect in the current proceeding.

Second, the BOC *Ex Parte* claims that the Commission has concluded that Section 332(c)(3)(A) only covers rates charged by CMRS providers to subscribers, not LEC-to-CMRS interconnection agreements. BOC *Ex Parte* at 8 *citing Petition on Behalf of the Louisiana Public Serv. Comm'n for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 FCC Rcd 7898, 7908 (1995). While the BOC *Ex Parte* cites the *Louisiana* decision as finding that state regulators have authority over CMRS interconnection, that decision actually denied the Louisiana Commission's petition to retain regulatory authority and did not address the Commission's jurisdiction under Section 332(c)(1). Moreover, the order itself makes plain that it is not intended to be the Commission's final word on the subject of jurisdiction, describing its "comment" on Louisiana's regulatory authority as "preliminary," saying that it "appears" the Louisiana Commission may have certain powers, and inviting parties to seek reconsideration on any specific regulations they believe should be preempted. *Id.* at ¶¶43, 47, 48. In addition, the Commission has specifically invited comment on whether to reconsider this decision.[28]

Third, the BOC *Ex Parte* relies on a 1987 Commission finding that LEC-to-cellular interconnection rates are "severable." BOC *Ex Parte* at 9, *citing The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987) (the *"Cellular Interconnection Order"*). The BOCs fail to explain, however, how a declaratory ruling issued six years before the Budget Act amended both Section 2(b) and Section 332 — and premised on the specific provision of Section 2(b) that

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27/ McCaw Cellular Communications, Inc., Petition for Clarification, at 5, filed in GN Docket No. 93-252, on May 19, 1994; MCI Telecommunications Corp., Petition for Clarification and Partial Reconsideration, at 14, filed in GN Docket No. 93-252, on May 19, 1994.

28/ *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 95-185, 94-54, FCC 95-505, at ¶ 112 n.162 (released January 11, 1996).

later was amended in 1993 — can have any effect on the Commission's interpretation of those provisions as amended.[29/]

CONCLUSION

The Commission has exclusive and plenary federal jurisdiction over all rates, terms and conditions regarding interconnection between LECs and CMRS providers. Bell Atlantic and Pacific would create many unnecessary problems for the Commission by reading more into the TCA than is actually there. Their wishful misinterpretation of the nation's communications law may be creative, but nothing more. Cox urges the Commission to heed the reasoned statutory framework established by the Budget Act of 1993, the Communications Act and the TCA.

When interpreting these enabling statutes, the Commission also must not lose sight of the policy implications of its jurisdictional conclusions. Cox's interpretation of the Commission's jurisdiction is consistent with the Congressional vision of increased competition in the telecommunications marketplace, expressed in both the 1993 Budget Act and the TCA. The BOC *Ex Parte* stands that vision on its head by claiming that the Commission lacks the power to adopt rules that will make it possible for wireless providers to compete effectively with landline carriers such as Bell Atlantic and Pacific. Cox's interpretation also is consistent with the Congressional intent to benefit CMRS providers in the 1993 Budget Act and to benefit competitors in the TCA. The BOC *Ex Parte* asks the Commission to adopt a legal interpretation of those statutes that would benefit incumbent landline carriers at the expense of CMRS

29/ The BOC *Ex Parte* makes this assertion because it claims that "Cox's argument depends on the further point that the interstate and intrastate aspects of CMRS are inseverable." BOC *Ex Parte* at 9. This claim, willfully or not, misstates Cox's jurisdictional analysis. In fact, while the Commission could choose to exert jurisdiction on inseverability grounds, nothing about Cox's analysis depends on the inseverability of CMRS interconnection. As described above, the 1993 Budget Act gave the Commission sole jurisdiction over all aspects of CMRS interconnection, whether or not they were severable. Nevertheless, it is true that CMRS-to-LEC interconnection (which even the BOCs concede falls within the Commission's jurisdiction under Section 332 as amended) and LEC-to-CMRS interconnection cannot be separated because they are two halves of a single transaction. As noted above, this point is underscored by LEC claims that current CMRS interconnection rates include compensation to the CMRS provider for termination of LEC traffic. *See supra* footnote 23. The *Cellular Interconnection Order* did not consider this issue because it was decided six years before the Budget Act amended Section 2(b) and gave the Commission its unchallenged power over CMRS-to-LEC interconnection. Consequently, it has no precedential effect in this proceeding.